

Cite as 2009 Ark. 533

**SUPREME COURT OF ARKANSAS**

No. 09-937

CHRISTOPHER BRANNING  
Petitioner

v.

GREG HARMON  
Respondent

**Opinion Delivered**      October 29, 2009

PRO SE MOTION FOR RULE ON  
CLERK [CIRCUIT COURT OF LEE  
COUNTY, CV 2008-160, HON. L.T.  
SIMES II, JUDGE]

MOTION DENIED.

**PER CURIAM**

In 2008, petitioner Christopher Branning filed a petition for writ of habeas corpus in Lee County Circuit Court, seeking release from incarceration at a unit of the Arkansas Department of Correction located in that county. The circuit court denied the petition by order entered on March 2, 2009. Petitioner timely filed a notice of appeal on April 6, 2009. The record was due to be filed in this court on July 6, 2009. Petitioner tendered the record on July 10, 2009, and our clerk correctly declined to file it.

Petitioner has now filed a motion for rule on clerk in which he seeks permission to file the record and proceed with appeal of the March 2, 2009, order denying his habeas petition. In his motion, petitioner offers a number of excuses for the delay in filing and complains of a number of perceived inequities concerning our procedures. Petitioner also acknowledges that he has been released from prison on parole. Pursuant to that admission, we deny the motion.

Because petitioner is no longer incarcerated, it is clear from the partial record before us that petitioner could not prevail on appeal, were we to permit the appeal to proceed. An appeal of the denial

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of postconviction relief, including an appeal from an order that denied a petition for writ of habeas corpus, will not be permitted to go forward where it is clear that the appellant could not prevail. *Lukach v. State*, 369 Ark. 475, 255 S.W.3d 832 (2007) (per curiam).

A circuit court does not have jurisdiction to release on a writ of habeas corpus a prisoner not in custody in that court's jurisdiction. *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (per curiam) (citing *Mackey v. Lockhart*, 307 Ark. 321, 819 S.W.2d 702 (1991)). Under our statute, a petitioner must make a "showing by affidavit or other evidence, [of] probable cause to believe" he is illegally detained. *Young v. Norris*, 365 Ark. 219, 226 S.W.3d 797 (2006) (per curiam); Ark. Code Ann. § 16-112-103(a)(1) (Repl. 2006). This court has held that "in custody" for purposes of determining the availability of a habeas remedy is limited to physical incarceration. *Neely v. McCastlain*, 2009 Ark. 189, \_\_\_ S.W.3d \_\_\_; *State v. Wilmoth*, 369 Ark. 346, 255 S.W.3d 419 (2007); see also *Anderson v. State*, 352 Ark. 36, 98 S.W.3d 403 (2003) (per curiam); *Bohanan v. State*, 336 Ark. 367, 985 S.W.2d 708 (1999) (application to proceedings under Ark. R. Crim. P. 37.1).

Because petitioner was released on parole and is no longer in custody on the judgment at issue, any proceedings on his petition for writ of habeas corpus are moot. We therefore decline to consider the merits of his motion for rule on clerk and the motion is denied.

Motion denied.